STATE OF MICHIGAN
IN THE SUPREME COURT

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Appeal from the Court of Appeals
The Honorable William C. Whitbeck, the Honorable Peter D. O'Connell
and the Honorable Patrick M. Meter
****

CITY OF NOVI, a Michigan municipal corporation,

Plaintiff-Appellant,

-vs-

ROBERT ADELL CHILDRENS FUNDED TRUST, FRANKLIN ADELL CHILDRENS FUNDED TRUST, MARVIN ADELL CHILDRENS FUNDED TRUST and NOVI EXPO CENTER, INC., a Michigan corporation,

Defendant-Appellees.
_____/

Supreme Court No. 122985

Court of Appeals No. 223944

Lower Court No. 98-008863-CC

SECREST WARDLE

BRIEF ON APPEAL— APPELLANT CITY OF NOVI

ORAL ARGUMENT REQUESTED

Respectfully submitted,

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December 14, 2004

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STATEMENT OF APPELLATE JURISDICTION

This Appeal is brought under MCR 7.301 *et seq*. This Court granted Plaintiff-Appellant City of Novi leave to appeal by order dated October 7, 2004.

DATE AND NATURE OF ORDER APPEALED FROM

Plaintiff-Appellant City of Novi appeals the decision of the Court of Appeals upholding the finding of the trial court, the Oakland County Circuit Court, dismissing the City's complaint to acquire property from the Defendants Robert Adell Childrens Funded Trust, Franklin Adell Childrens Funded Trust, Marvin Adell Childrens Funded Trust and Novi Expo Center, Inc. (the "Adells"), by way of eminent domain.

STATEMENT OF QUESTION INVOLVED

The Michigan and United States constitutions state that private property may be acquired by power of eminent domain only for a "public use." The City of Novi sought to acquire through eminent domain a small part of a much larger property owned by the Adells. The City Council's declaration of taking confirmed that the area taken would be used for the construction of a public road, to be owned and controlled by the City and open to the public at all times. The road was to replace an existing driveway access on a major thoroughfare for two private industrial properties. The Adells stipulated in the trial court that the existing driveway access was unsafe, and did not deny that the proposed road was a safer way to access the two properties. Despite that stipulation and concession, and the public ownership and control of the road, the trial court held that the condemnation was for a private purpose and dismissed the City's complaint. The Court of Appeals affirmed. ***Did the lower courts err in concluding that the proposed public road was not a public use under the state and federal constitutions?***

Appellant City of Novi says "Yes."

Appellees the Adells say "No."

The lower courts say "No."

This Court should say "Yes."

INTRODUCTION AND STATEMENT OF CASE

This case arises out of a decision by the City Council of the City of Novi to take, by exercise of eminent domain, property belonging to the Adells to build a road. The road was part of a comprehensive traffic improvement plan intended to implement the recommendations of a study prepared for the City by an independent traffic consultant. The main feature of the comprehensive plan was the establishment of a "ring" road around the intersection of Grand River Avenue and Novi Road. The ring road, which was not objected to by the Adells, would have diverted traffic away from the intersection and through each of its surrounding "quadrants," thereby both lessening congestion at the intersection and making adjacent (mostly retail) businesses more accessible. Another key feature of the plan was the elimination, in the northwest quadrant, of an existing driveway access on Grand River serving two industrial users, whose properties would then be accessed by a proposed "spur" road, about 600 feet in length, leading from the new ring road across the vacant southernmost edge of the Adells' property. According to the study, this revised access would make travel on Grand River safer for both the public traveling that road and the customers, employees, and visitors of the two industrial uses.

The question before the Court is whether the taking of the Adells' property for the spur road was an exercise of eminent domain for a ***public use***, as required by both the state and federal constitutions. The first critical fact in answering that question is that the Adells ***stipulated in the trial court that the existing driveway access on Grand River for the two industrial properties was dangerous and unsafe and never denied that the alternative new access for those properties to the proposed ring road was safer and in the interest of the public health, safety, and welfare***. The second important fact is that all of the road improvements, including the spur road, were to be ***publicly owned and controlled***, and available for use by the general public. Finally, the road project

was ***not part of a community or economic development scheme***. Given these uncontested facts, Appellant City submits that the taking was for a use that was "public in fact,"[1] even if that use also benefited the two industrial properties. The lower courts therefore erred in finding that the taking was for a private use.

This is the first case that the Court will decide involving the public use limitation, found in the Fifth Amendment of the federal constitution and in article 10, §2 of our 1963 state constitution, since its recent and well-received decision in Wayne County v. Hathcock.[2] Hathcock overruled the lightning rod case of Poletown Neighborhood Council v. Detroit,[3] and now stands firmly for the proposition that the taking of property by eminent domain for transfer to a private third party for community or economic development purposes does not fall within the "common understanding" of public use.[4]

The lower courts relied on Poletown for their conclusion that the spur road was a private use because the benefits of the road for the two private industrial properties "predominated" over the benefits of the road to the public. That "balancing" test, weighing public and private interests, has now been repudiated by Hathcock, which establishes in its place the "instrumentality of commerce" test, which seeks to determine whether the use intended by the private owner for whom the property will be taken is sufficiently akin to those uses for which eminent domain is traditionally exercised—roads, utilities, municipal buildings—that the taking, even when done for the benefit of a private owner, still results in a use that is public in nature. Example of such uses given in Hathcock include railroads, canals, and gas lines. The private office/technology park at issue in that case was not, the Court held, such a use.

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[1] Ryerson v. Brown, 35 Mich. 333 (1877) (Cooley, J.).
[2] Wayne County v. Hathcock, 471 Mich. 445; 684 N.W.2d. 765 (2004).
[3] Poletown Neighborhood Council v Detroit, 410 Mich. 616; 304 N.W.2d. 455 (1981).
[4] Hathcock, supra, at 471.

The Court should use this case to clarify that Hathcock's discussion of the public use limitation in the context of transfers to private third parties ***does not apply*** to takings for traditional public improvement uses like roads, which are already known and recognized to be public in nature. As Justice Cooley acknowledges in his Constitutional Limitations treatise, cited often by this Court in Hathcock, "[e]very government is expected to make provision for the public ways, and for this purpose it may seize and appropriate lands."[5] Traditional public uses like roads, sewers, water lines, and storm drains—the ownership of which remains in the public's hands, and which are available for actual use by the public—need not pass muster under some kind of "heightened" scrutiny test, whether under Poletown or Hathcock. They simply ***are*** public.

The lower courts erred in finding that the spur road at issue was not a public use, because they, like the Adells, focused not on the public nature of the road, or the legitimate public purposes it would achieve, but on the unremarkable fact that two private properties stood to benefit incidentally from the road. Governmental action that produces a "mix" of public and private benefits is neither improper nor unusual. As Justice Brandeis said in his well-known dissent in Pennsylvania Coal Co. v Mahon,[6] in the context of regulatory takings or "inverse" condemnations, "[t]he purpose of a restriction does not cease to be public because incidentally some private persons may thereby receive gratuitously valuable special benefits."

The Adells' challenge here is not to the ***end*** that the City had in mind (a road improvement project) or to the ***means*** by which it hoped to accomplish that end (a condemnation action); rather, it is to the City's ***motivations or intentions*** in proposing the spur road improvement. Their challenge

[5] 1 Cooley, Treatise on the Constitutional Limitations (5th ed), p 533 (1883).

[6] Pennsylvania Coal Co. v Mahon, 260 U.S. 393, 43 S.Ct. 158; 67 L.Ed. 322 (1922) Justice Brandeis' dissent planted the seeds that would ripen many years later in majority opinions of that Court that form the modern-day inverse condemnation law described in Penn Central v. New York, 438 U.S. 104; 98 S.Ct. 2646; 57 L.Ed.2d 631 (1978) and Lucas v. South Carolina Coastal Comm'n, 505 U.S. 1003; 112 S.Ct. 2886; 120 L.Ed.2d 798 (2000).

thus raises not a question of ***public use***, which is a constitutional or legal issue, but a question of ***public necessity***, which involves a factual inquiry into whether the City committed "fraud, error of law, or abuse of discretion" in making its decision to take the property for the spur road.[7]

Recognizing that their burden would be substantially insurmountable in a public necessity attack, where the standard of review is deferential to the City's legislative determination, the Adells cast their claim as a public use challenge, invoking Poletown and hoping to capitalize on the obvious fact that, although the spur road was to be public, it would generally be used in connection with the two industrial uses. To gild that claim, the Adells asserted that the taking of the property for the spur was a pretext, a way for the City to secure donations toward the project from one of the private industrial properties and/or to get funding from the state.

In the end, though, the Adells' theory that the City somehow decided to build the spur road at Wisne's behest, or to get a state grant, is belied by the 1984 traffic study which suggested the improvement. The City's stated basis for the construction of the spur road—closing an ingress/egress on Grand River that the City determined (and the Adells actually stipulated) to be dangerous—survives the limited scrutiny given by courts to such local legislative determinations in a necessity challenge. The extraneous details presented in the trial court about how the project was to be funded, or the negotiation techniques used by the City, might make for lively discussion on the state of municipal financing, but they are not relevant to the concepts of public use or public necessity. The evidence presented by the Adells does not amount to "fraud," which contemplates false representations relied on by the Adells to their detriment; or "error of law" by the City as to its legal authority to build the road; or "abuse of discretion," meaning action "so palpably and grossly

[7] Hathcock, supra, at 456.

violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason, but rather of passion or bias."[8]

The starting point for the Court's analysis in this case should be the fact that the property taken would have remained in public ownership and control in perpetuity, a crucial distinction from Hathcock. The next point should be that the proposed improvement project was not part of a community or economic development scheme, as in Hathcock, but rather was a road, the kind of improvement for which the power of eminent domain has been traditionally exercised. The final point, bringing this case solidly within the public use limitation as commonly understood, should be that the uncontested fact that the spur road would achieve a legitimate public objective—lessening an admitted public danger and promoting public safety—thereby providing the recognized public benefit missing in Hathcock.

This case is not strictly governed by Hathcock; rather it picks up where Hathcock left off, presenting the Court with an opportunity to bring some clarity to those more typical cases that do not involve the taking of property intended to be transferred to third parties. For most municipalities or public agencies, the import of this case will not be to their ability to foster the kind of community or economic development at issue in either Poletown or Hathcock, or splashed across the front pages of national papers. It will be in how this case affects their more fundamental ability to safely navigate the ever-widening gap between fiscal responsibility and fully providing for the public health, safety, and welfare.

Taking into account the "commonly understood" concepts of public use and public necessity, the facts and circumstances of this case allow the Court to create a practical and workable post-Hathcock rule of law clarifying, for property owners and condemnors alike, that traditional public improvement projects, like road improvements, that will be owned, controlled, and available for use

[8] Alken-Ziegler, Inc. v. Waterbury Headers Corp., 461 Mich. 219, 227; 600 N.W.2d. 638 (1999).

by the public, and will achieve a legitimate public objective, remain securely moored in a safe constitutional harbor.

STATEMENT OF FACTS

The Adells argued their case below as a public use case governed by Poletown.[9] During the presentation of the City's evidence at the hearing before the trial court, the Adells stipulated that the existing driveway access on Grand River for the two industrial uses was dangerous and unsafe; they also never denied that the alternative spur road access for those properties to the proposed ring road was safer and in the interest of the public health, safety, and welfare. [10] On the basis of that position, the City altered the entire presentation of its case, agreeing not to call the engineering and traffic safety experts who were available for testimony. At that point, the "public use" case was effectively over: the testimony had established that the proposed improvement, the spur road, would be publicly owned, publicly controlled, and publicly maintained; available at all times to the public at large; and in the interest of the public safety

The hearing conducted by the trial court took place over three days, but was not a three-day hearing; the entire transcript fills only 317 pages, including substantial opening and closing statements. A number of witnesses were presented by the Adells, but the examination of most was short, with the cross-examination by the City not primarily directed to "rebutting" the characterization of the facts by the Adells' counsel, but to merely confirming the ***public*** nature of the road, and its public benefits. Only a few exhibits were offered into evidence, a fraction of the information compiled during discovery.

As the Court reads the testimony below, the parties' respective recitations of the facts, and the pleadings challenging the spur road, it must keep in mind that the record was created in the

[9] See generally, Appendix, pp 179a-215a; 216a-238a.
[10] TR Vol. II, at 259-263; Appendix, pp 289a-293a.

context of a public use claim, not a public necessity claim. Despite the Adells' insistence to the contrary, neither lower court truly addressed the public necessity question that the Adells have now argued on appeal,[11] and neither court, in the end, made the finding of "fraud, error, or abuse of discretion" that is required in order to find for the property owner in a necessity review.

A. Procedural History

The spur road at issue was from the start designed as an integral part of a larger road improvement project that would establish a "ring road" around the Grand River Avenue/Novi Road intersection. The proposed ring road was to pass through the Adell property in the northwest quadrant of the intersection. The spur road was proposed as an "offshoot," about 600 feet in length, to replace a curb cut on Grand River for two large industrial uses.[12]

The City's complaint to acquire the property was filed on September 4, 1998, in the Oakland County Circuit Court and assigned to the late Hon. Robert C. Anderson.[13] On October 1, 1998, all defendants, including the Robert Adell Childrens Funded Trust, the Franklin Adell Childrens Funded Trust, and the Marvin Adell Childrens Funded Trust (collectively referred to as the "Adells"), filed a motion challenging the public purpose and necessity of the taking. The basis of the Adells' argument was that: (1) the City was attempting to acquire the property for the primary benefit of two other private property owners; and (2) the City failed to invoke adequate enabling legislation.[14]

Although the Uniform Condemnation Procedures Act (UCPA)[15] requires that a hearing on a motion challenging "necessity" be conducted within 30 days, and that a determination be made within 60 days after the date on which the hearing is first scheduled, the hearing was not conducted

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[11] See, e.g, the Adells' "Supplemental Brief in Opposition to Leave to Appeal," dated September 24, 2004.
[12] Appendix, p 132a.
[13] Appendix, pp 106a-133a.
[14] Appendix pp 134a-146a. The remaining Defendant, the Novi Expo Center, Inc., did not join in the motion. The underlying property from which the road right-of-way was sought is owned by the Adells and was leased at the time to Defendant Novi Expo Center for operation of an exposition facility.

until July 19, 20, and 22, 1999. The trial court did not issue its opinion and order until November 17, 1999, at which point it held that the spur road was a private use, because it was primarily for the benefit of the two abutting private industrial users, and that their private benefits predominated over the benefits to the general public.[16] Based on that holding, the trial court found the taking to be unconstitutional under Const. 1963, art. 10, §2, and dismissed the City's entire complaint—not just for the spur road, but also the ring road, to which the Adells had not objected.

The Court of Appeals affirmed that decision in a published opinion dated October 4, 2002,[17] and an order denying the City's motion for reconsideration on December 11, 2002. This appeal, by leave granted on October 7, 2004, followed.

B. The Public Road Improvement Project

The genesis of this condemnation action is a traffic and land use study completed in January of 1984. The study, entitled "Ring Road Feasibility Study and Land Use Analysis: Grand River Avenue – Novi Road Area" was admitted as Plaintiff's Exhibit 2 at trial, and is attached beginning at p 21a of the City's Appendix. It was prepared by Vilican-Leman & Associates, Inc., to address increasing traffic volumes in the area of Grand River Avenue and Novi Road. Development in the area was even at that time proceeding apace, with Twelve Oaks Mall, West Oaks Mall, and the Town Center development bringing more and more traffic to the City. The study sought to determine whether a ring road concept was feasible, and, if so, where it could best be located.[18]

The study verified that even as of 1984 traffic volumes had increased at the Grand River/Novi intersection to the point where traffic remained heavy despite some widening

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[15] MCL 213.56; MSA 8.265(6), p 9.
[16] Trial Court Opinion and Order, Appendix, p 302a.
[17] City of Novi v. Adell, 253Mich. App. 330; 659 N.W.2d. 615 (2002).
[18] Appendix, p 21a-83a.

improvements and was often slow moving.[19] The study found that the lack of a properly developed street system in the area intensified congestion on the two major arteries. Without an effective street network, most land uses had developed along the two principal thoroughfares, contributing to traffic congestion. According to the study, traffic improvements would have to include the development of additional streets to provide alternate routes of travel and access to area developments.[20] The study concluded that a ring road system would relieve congestion on both Grand River Avenue and Novi Road,[21] and then went on to consider appropriate locations for the ring road within each quadrant of the intersection.

With regard to the northwest quadrant, the subject of the present dispute, the consultant made a number of observations. First, the northwest quadrant presented some technical problems because of poor soils. Second, the potential locations for the ring road through the northwest quadrant was limited by the location of an existing street, then named Fonda Street. Finally—but most importantly—while it was desirable to locate the ring between two large industrial uses within the quadrant, that result would have placed the intersection of the ring road with Grand River too close to a bridge ("viaduct") carrying Grand River traffic over a railroad track to the immediate west.[22]

Because of these difficulties, the consultant actually considered abandoning the ring through the northwest quadrant. Ultimately, though, the study acknowledged the need to resolve a ***critical traffic problem*** (emphasis added)."[23] The report observed:

> ***Study continued in this quadrant, however, because another means of letting employee traffic out of the three industrial uses near the east end of the viaduct needed to be found.*** Traffic exiting these three uses must now exit onto Grand River Avenue at the foot of the

[19] Appendix, p 49a.
[20] Appendix, p. 50a.
[21] Appendix, p. 55a.
[22] Appendix, p. 62a.
[23] Appendix, p. 62a.

viaduct. ***This has created a hazardous traffic problem resulting in frequent accidents.***[24] (Emphasis added.)

The industrial uses referenced in the study included what would later be called the A.E. Wisne/PICO facility and General Filters facility. The Wisne facility in particular was quite large—it is in fact one of the largest structures in the City. General Filters was also an ongoing industrial operation of not insignificant size. These were the two businesses that the Adells later argued would receive a "private benefit" as a result of the condemnation.

During the evidentiary hearing on the public use challenge, the Adells, as noted above, ***stipulated*** that the existing traffic condition is/was hazardous, and that the current situation is/was dangerous to travelers going east and west on Grand River.[25] The Wisne/PICO and General Filters facilities at the time shared an access to Grand River. The City's traffic expert, William Stimpson, testified that the shared access was not reasonably safe, and that it was deficient with respect to well-recognized national standards for access. Indeed, he concluded the access was dangerous for traffic traveling on Grand River Avenue, putting it at great risk.[26]

This traffic hazard was apparent enough even at the time of the traffic study in 1984 that the portion of the ring road through the northwest quadrant specifically proposed the spur road to provide access to the two industrial properties and to eliminate the direct access to Grand River Avenue. The map depicting the "Proposed Ring Road Corridor" included in the 1984 ring road study described the spur as a future "sixty-foot right-of-way."[27]

The ring road study also discussed possible funding for the road improvements. One possibility was that the road improvements would be constructed in phases by private interests as development took place, and then dedicated to the City just as subdivision developers dedicate

[24] Appendix, p 62a.
[25] Tr. II, pp. 260-261; Appendix, pp 291a-292a.
[26] Tr. II, pp. 258-260; Appendix, p 289a-291a.

subdivision streets. Another possibility was funding through the creation of a special assessment district, a special tax upon the area property. A third suggestion was the establishment of a "tax increment finance" district within the area, which would capture existing area tax revenues to fund the infrastructure. Lastly, a voted millage increase was suggested.[28]

Ultimately, the City decided to build the portion of the ring road through the northwest quadrant with predominantly public funds, with some private contributions. The City submitted to the State of Michigan a grant application for funding under "Category A: Economic Development Road Projects."[29] Such projects require local matching funds (i.e., non-state funds). The local match here was proposed to be met by combining amounts from (1) the value of anticipated right-of-way donations; (2) City funds; and (3) the construction of the industrial spur portion of the project with City funds and private donations.

Progressive Tool & Industries Co. (PICO), which owned the Wisne facility, agreed to a request by City Manager Edward Kriewall to contribute $200,000 to the project (which was in excess of one million dollars).[30] Later, Kriewall requested an additional $174,000 from Wisne.[31] In a letter to Lawrence Wisne, Kriewall proposed that the additional contribution be in the form of special assessment paid over 15 years.[32] Although the industrial spur had been depicted as far back as the 1984 Ring road study as a public right-of-way, Kriewall noted that in exchange for Wisne's

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[27] Appendix, p 65a.
[28] Appendix, p 81a-82a.
[29] An initial grant application, which sought funds under the state's Transportation Economic Development Funds Act, MCL 213.51 *et. seq.*, and which also sought funding for the industrial spur, was turned down because the State felt the spur disproportionately benefited three private properties (Wisne/PICO, General Filters, and the Adell property) to a greater degree than the general public. (Tr. I, pp. 135-136.) Nevertheless, the state would not fund the rest of the ring road project unless the industrial spur was also constructed. In other words, the industrial spur provided a connection between the ring road and the industrial properties that was essential to the purpose that justified the state's expenditure of grant funds. (Tr. I, pp. 102-104.) The purpose of the Category A program is to provide public road improvements, which result in new business or expanded business, thereby creating jobs and advancing commerce. (Tr. I, pp. 106-108.)
[30] Tr. I, pp. 58-59; Appendix, p 239a-240a.
[31] Tr. I, pp. 64-65; Appendix, p 245a-246a.

agreement to the assessment the roadway would be a public street and would thereafter be responsible for its maintenance.

Wisne rejected the request for more money. Still, the industrial spur remained proposed as a public street, as it had been depicted in the 1984 ring road study, on the basis that it would achieve legitimate public safety objectives.[33] According to the City's Public Services Director, Anthony Nowicki, even though the additional $174,000 was not contributed, the roadway was still to be a public road, which is in fact how it was described in the City's eventual condemnation resolution and circuit court complaint.[34]

At the time of the evidentiary hearing, the Road Commission for Oakland County, which has jurisdiction over Grand River, was clearly relying on construction of the industrial spur as part of the overall plan for improving traffic in the area.[35] The Road Commission had for some time been planning a reconstruction of the Grand River bridge over the railroad tracks.[36] The design standards at the time required a larger bridge. The grade of the bridge thus had to be raised, causing it to extend further to the east.[37] As a result, the bridge reconstruction project was to eliminate the direct access that Wisne and General Filters then had to Grand River.[38] Initially, the Road Commission proposed shifting that existing joint access further east, but that then conflicted with the location of the ring road.[39] Eventually, the Road Commission finalized its bridge plan by relying upon the City's construction of the ring road ***and*** the spur road to replace the access to the industrial properties.[40]

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[32] See generally Appendix, p 105a.
[33] Tr. I, pp. 68-69; Appendix, p 249a-250a.
[34] Tr. I, pp. 192-193; Appendix, p 269a.
[35] Tr. II, p 237; Appendix, p 269a.
[36] Tr. I, p. 149.
[37] Tr. II, pp. 232-233.
[38] Tr. II, p. 232.
[39] Tr. I, pp. 150-151, 153.
[40] Tr. II, pp. 234, 237. The General Filters facility was to have access to both the ring road and the industrial spur (Tr. I, p. 79). Access to the Wisne facility was to be through the industrial spur.

STANDARD OF REVIEW

This Court's opinion in Hathcock sets forth the standard of review for all aspects of this case in clear terms. Issues of statutory construction—for example, with regard to the authority of a municipality to condemn land for public roads—present questions of law subject to *de novo* review by this Court.[41] The determination of ***public necessity*** in connection with a particular exercise of eminent domain, according to Hathcock, involves application of the statutory test set forth in the UCPA,[42] as to which Hathcock confirms that "Michigan's courts are bound by an agency's determination that a proposed condemnation serves a public necessity unless the party opposing the condemnation demonstrates 'fraud, error of law, or abuse of discretion,'"[43] citing State Highway Comm v Vanderkloot[44] and Detroit v Lucas.[45]

By contrast, the question whether an improvement (like the road at issue here) is in fact a ***public use***, is a constitutional question that this Court determines *de novo* as a matter of law.[46]

[41] Hathcock, supra, at 455, n 7, citing Morales v. Auto-Owners Ins. Co. (After Remand), 469 Mich. 487, 490; 672 N.W.2d. 849 (2003).
[42] MCL 213.56(2); MSA 8.265(6).
[43] Hathcock, supra, at 455.
[44] State Highway Comm'n. v. Vanderkloot, 392 Mich. 159; 220 N.W.2d. 416 (1974).
[45] Detroit v. Lucas, 180 Mich. App. 47; 446 N.W.2d. 596 (1989).
[46] Hathcock, supra, at 455.

ARGUMENT

The Michigan and United States constitutions state that private property may be acquired by power of eminent domain only for a "public use." The City of Novi sought to acquire through eminent domain a small part of a much larger property owned by the Adells. The City Council's declaration of taking confirmed that the area taken would be used for the construction of a public road, to be owned and controlled by the City and open to the public at all times. The road was to replace an existing driveway access on a major thoroughfare for two private industrial properties. The Adells stipulated in the trial court that the existing driveway access was unsafe, and did not deny that the proposed road was a safer way to access the two properties. Despite that stipulation and concession, and the public ownership and control of the road, the trial court held that the condemnation was for a private purpose and dismissed the City's complaint. The Court of Appeals affirmed. *The lower courts erred in concluding that the proposed public road is not a public use under the state and federal constitutions.*

In a recent commentary on the Hathcock decision, University of Chicago law professor and property rights theoretician Richard Epstein said that he hoped that the decision would put to rest some issues about the outer limits of the public use concept, thereby letting local governments get back to what he called their "primary task—improving infrastructure for the benefit of us all."[47] Here in Michigan, the primary infrastructure improvement for which municipalities are responsible is the local public road system—a fact confirmed by the clarity with which their authority to use eminent domain to construct them is stated. The dearth of case law directly addressing the authority of local governments to use eminent domain for public road improvements merely reflects the historical lack of challenge that authority and its regular use over time. For the same reason, even the scholarly treatises or other "secondary" sources of law and constitutional theory spend little time discussing such improvements. As Justice Cooley wrote in the slightly different (but ultimately related) context of the nature of local home rule authority generally, "some things are too plain to be written."[48]

[47] "Look at Damages First," National Law Journal, Vol. 26, No. 52September 27, 2004.
[48] People v Hurlbut, 24 Mich. 44 (1877) (Cooley, J.).

This brief will address the statutes, case law, and other bases on which this Court is asked to find that the public road at issue was:

(1) **authorized by statute, including the Home Rule Cities Act (HRCA);** [49]

(2) **intended to remain "public in fact,"**[50] **and not contemplated for transfer to a private third party, making both the "heightened scrutiny" test of Poletown and "instrumentality of commerce" analysis of Hathcock irrelevant to the inquiry;**

(3) **stipulated at trial that the existing access onto Grand River for the two industrial uses was dangerous and unsafe, and that the alternative new access for those properties to be provided by the proposed ring road was safer and in the interest of the public health, safety, and welfare; and**

(4) **a reasonable exercise of the City's discretion that withstands the statutory "public necessity" review under the UCPA.**

The Hathcock and Poletown decisions are discussed below to provide the context of the "public use" question in Michigan. It is the City's position, though, that their holdings are not directly implicated by the facts of this case.

1. Michigan Statutes Authorize Taking Property For A Public Road, As A Public Use.

The Court of Appeals acknowledges, in its opinion below, that one basis for the City's authority to condemn property for a public road is the Home Rule Cities Act (HCRA). The Court then makes an astonishing error of law, and one that colors the rest of the Court's analysis, by concluding that the HCRA does not by its terms describe a public street as a public use. In fact, the HCRA—the legislative grant of authority to cities in terms of what must, may, and cannot be in a city charter—specifically identifies streets as a public use:

> Each city ***may*** in its charter provide:
>
> (1) Public buildings, grounds, acquisition. ***For the acquisition by*** purchase, **gift**, ***condemnation***, lease, construction or otherwise, either within or without its corporate limits and either

[49] Home Rule Cities Act, MCL 117.1 *et. seq.*; MSA 5.2071 *et seq.*
[50] Ryerson, supra,

> within or without the corporate limits of the county in which it is located, of the following improvements including the necessary lands therefor, viz.: . . .***streets***. . .sewage disposal. . . public works. . . for the costs and expenses thereof.
>
> (2) Condemnation. For the acquisition by purchase, gift, condemnation, lease or otherwise of private property, either within or without its corporate limits and either within or without the corporate limits of the county in which it is located, ***for any public use or purpose*** within the scope of its powers, ***whether herein specifically mentioned or not***. (Emphasis added.)[51]

The conclusion that the condemnation of property for streets is a public use or purpose "herein specifically mentioned" (i.e., in the immediately preceding paragraph) is inescapable, yet the Court of Appeals goes out of its way to remark, incorrectly, that the HCRA does not contain a "finding of...public purpose."[52]

Other statutory provisions also directly or by necessary implication confirm that public roads are, by definition, public uses. For example, the "Highway Quick Take Act"[53] provides:

> ***Cities***, villages, townships, drainage districts, counties, boards of county road commissioners, and the state highway commission, referred to in this act as the petitioner, ***are authorized and empowered to secure the fee simple or lesser estate*** and real property on other property from the owners under the following conditions:
>
> (a) Property for the right-of-way for limited access highways ***and other highways*** to be laid out, altered, or widened, or for changing the direction or line of those highways. (Emphasis added.)

Similarly, and more directly, the Boulevard, Street, and Alley Acquisition Act,[54] passed in 1929 and never repealed, specifically provides that:

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[51] MCL 117.4e; MSA 5.2074e. Though not directly relevant to this discussion of condemnation, the Court should note the authorization here for a city to acquire a public road by "gift"—e.g., where someone else (e.g., a private party) builds the road for the city, or donates the right-of-way for it.
[52] City of Novi v. Adell, 253 Mich. App. at 349.
[53] MCL 213.361, *et. seq.*; MSA 8.261(1) *et seq.*
[54] MCL 213.221; MSA 8.211.

> Whenever the legislative body of any municipality shall determine that it is necessary to ***acquire, open or widen any boulevard, street or alley within said municipality***, and whenever such legislative body shall determine that in order to carry out such proposed improvement most advantageously that it is necessary to take private property adjacent to the proposed improvement, the fee to such private property may be purchased or taken by condemnation proceedings and ***the taking of such private property for the purpose of advantageously carrying out the proposed improvement contemplated is hereby declared to be a taking for a public purpose***. (Emphasis added.)

Other relevant statutory provisions include 1911 PA 149 the act that was at issue in Hathcock,[55] which specifically contemplates the taking of land for highway purposes, including land adjacent to the proposed highway,[56] and 1925 PA 352, which relates exclusively to highways established by the county road commissioners and state highway commissioner.[57]

The statutes cited above, particularly the HCRA, which is specifically referenced in the City's condemnation complaint, should end the ***public use*** inquiry as a matter of law. A public road is a public use, though whether the property being taken for the road is being taken for a ***public necessity*** is a separate question. The Court of Appeals spent a significant portion of its opinion acknowledging that distinction, only to focus on the former, a constitutional issue, rather than the latter, a factual matter, in contravention of its obligation to avoid reaching constitutional questions where possible.[58]

2. Michigan Case Law Confirms That A Public Road Is A Public Use

Const. 1963, art. 10, §2, states that "Private property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law." The Fifth Amendment of the United States Constitution similarly provides: "nor shall private property be

[55] MCL 213.21, *et seq.*; MSA 8.11, *et seq.*
[56] MCL 213.23a; MSA 8.13(1).
[57] 213.171, *et seq.*; MSA 8.171, *et seq.*
[58] Jott, Inc. v. Clinton Twp., 224 Mich. App. 513; 569 N.W.2d. 841 (1997).

taken for public use without just compensation."

There is no direct authority in either constitution specifically granting the right of eminent domain to any governmental entity—federal, state, or local. It has been held, however, that such right exists as a sovereign right, and certainly the phrasing of both constitutional provisions (which assume that right) supports that conclusion.[59] There is actually no express limitation in either the federal or state constitution against using the eminent domain authority for other than public use, but that, too, has been widely (and apparently with no historical opposition) read into the eminent domain authority.[60] Municipalities get their authority to exercise eminent domain rights through the state, by statute.[61]

A. The "Public Use" Concept Generally

The nature and extent of the "public use" limitation has been debated since the framing of the federal constitution and each state constitution thereafter, and is the subject of countless state and federal court decisions. As is apparently still the case, concern about the use of eminent domain for the benefit of private individuals or corporations drove the development of the law regarding the meaning of the term "public use."

The primary ideological dispute as the law developed in the 19th Century was between the "actual use" and "public benefit" schools of thought. The stricter "actual use" school permitted takings as long as the private beneficiary provided a service that was accessible to the general public. This theory was often applied to allow condemnation by railroads and other infrastructure development corporations that were effectively providing public accommodations subject to public

[59] See generally, Kohl v. United States, 91 U.S. 367, 372; 23 L.Ed. 449 (1876); Mark C. Landry, *The Public Use Requirement in Eminent Domain—A Requiem*, 60 Tul. L. Rev., 419, 421 (1985). See also, Hathcock, supra, at 456.

[60] See generally, Missouri Pacific Railway v. Nebraska, 164 U.S. 403, 416-417; 17 S.Ct. 130; 41 L.Ed. 489 (1896).

[61] Chesapeake & Ohio Railway v. Herzberg, 15 Mich. App. 271; 166 N.W.2d. 653 (1968).

regulation and required by law to accept the patronage of the public.[62] The more lenient "public benefit" school of thought weighed whether the taking provided ***any*** benefit to the public, including general economic benefits. A good statement of the two positions is found in 1 Lewis, A Treatise on the Law of Eminent Domain in the United States, published in 1909:

> The different views which have been taken of the words 'public use' resolve themselves into two classes: ***one holding that there must be a use or right of use on the part of the public or some limited portion of it, the other holding that they are equivalent to public benefit, utility or advantage.***[63]

In light of the Court's recent opinion and decision in Hathcock, there is no need for an extensive discussion of the historical evolution of the public use limitation, or of the distinction between the ways federal courts approach that issue as compared to this state. From the federal perspective, the broader "public benefit" school culminated in two decisions of the United States Supreme Court, Berman v. Parker[64] and Hawaii Housing Authority v. Midkiff.[65]

Poletown was one of the high water marks for the "public benefit" school of thought. In that case, the City of Detroit condemned about 320 acres of land, which it then conveyed to the General Motors Corporation for the construction of an automobile plant. Another 145 acres adjacent to the Detroit property was condemned by the City of Hamtramck. The claimed public benefit from the taking was the alleviation of unemployment in the City of Detroit. The plant was projected to

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[62] See generally, 2A Nichols, Eminent Domain (3d ed rev) §7.02[2] (1999).

[63] 1 Lewis, A Treatise on the Law of Eminent Domain in the United States, (3d ed), §257, p 504-505 (1909).

[64] Berman v. Parker, 348 U.S. 26 (1954). In Berman, the U.S. Supreme Court upheld the taking of private property for immediate transfer to another private property for purposes of economic development, finding that Congress had specifically authorized the taking for urban revitalization and had explicitly determined that urban revitalization was a public purpose, citing the District of Columbia Redevelopment Act of 1945.

[65] Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984). In Midkiff the U.S. Supreme Court considered the validity of a Hawaiian state law allowing the state to take land from lessors and transfer it to lessees. At the time of the enactment, the Hawaiian legislature made a determination that 72 private individuals owned approximately half of the state's land, while the federal and state governments owned nearly all of what remained. The Midkiff Court upheld the takings, finding that "where the exercise of the eminent domain

employ some 6,150 people. This Court concluded that the power of eminent domain was being used primarily to accomplish the essential public purpose of alleviating unemployment and revitalizing the economic base of the community. The benefit to General Motors was described as "incidental."[66]

This Court overruled Poletown in Hathcock. In Hathcock, Wayne County assembled a number of parcels in a 1,000-acre area near the Metropolitan Airport for the purpose of facilitating development of the proposed "Pinnacle Project," which was to be a privately-owned, state-of-the-art business and technology park with a conference center, hotel accommodations, and a recreational facility. The County hoped that the development might create as many as 30,000 new jobs and raise some $350 million in tax revenues for the County.

Several property owners in the project area refused to sell to the County. The County brought eminent domain proceedings to condemn these remaining properties. In the trial court, the property owners argued that the proposed condemnations were unlawful because their properties would not be put to a "public use," but would rather be transferred to private developers of the Pinnacle Project. Citing Poletown, the trial court upheld the condemnations as being for a "public use" because of the generalized economic benefit of the Pinnacle Project to the County. The Court of Appeals affirmed on the same basis.

This Court disagreed and overruled Poletown, holding that the case was "a radical departure from fundamental constitutional principles and over a century of [the] Court's eminent domain jurisprudence."[67] The Court explained that Poletown had improperly applied the "public use" requirement of the Constitution and could not be used to justify the County's actions in this case.

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power ***is rationally related to a conceivable public purpose***, the Court has never held a compensated taking to be proscribed by the public use clause." (Id. at 241.) (Emphasis added.)

[66] Poletown, supra, at 647-660 (Ryan, J., dissenting).

[67] Hathcock, supra, at 479.

Based on its pre-Poletown decisions, as elicited in the well-known Poletown dissent filed by Justice Ryan, the Hathcock Court held that a transfer of condemned property to a private entity would be appropriate in only three limited circumstances:

(1) Where public necessity of the extreme sort requires collective action; e.g., where long corridors of land must be obtained for the construction of a highway, railroad, canal, or other instrumentality of interstate commerce;
(2) Where the property remains subject to public oversight after transfer to a private entity; and
(3) Where the property is condemned because of facts of independent public significance; e.g., for the purpose of clearing slums or dilapidated and blighted housing.

The Hathcock decision will no doubt figure prominently in the upcoming discussion by the United States Supreme Court on the same public use/economic development issue in the context of the U.S Constitution in Kelo, et al v. City of New London, et al, 843 A.2d. 500 (2004), *lv gtd* ___ U.S. ___, (2004), recently accepted by that Court for leave to appeal.

Although this Court held this case in abeyance pending its decision in Hathcock, it is the City's position that this case is not dependent upon the analysis in either Hathcock or Poletown. Hathcock, Poletown, and Kelo all involve cases in which the condemning authority took property under eminent domain with the intention to then transfer the property to a private third party, who would own or develop it for private uses. This case, by contrast, involves the taking of property by the City of Novi for a public roadway, for reasons of traffic safety, with the acquired property to remain under the full ownership and control of the City.

B. Michigan Public Use Cases Relating to Roads

The Court of Appeals pronounced below that "a highway or street is not automatically a public use for land the government takes."[68] It said this again, although differently, at the end of its opinion: "the fact that A.E. Wisne Drive is to be a public road does not, standing alone,

[68] City of Novi v Adell, 253 Mich. App. at 358.

automatically mean that the public purpose/public use would be advanced by its construction."[69] Assuming that the Court of Appeals meant that the availability for use of the road by the public does not satisfy the implied prohibition against taking private property for the use of another private property owner, its position is against the great weight of authority in the country and, more importantly, in this state. There is ***no case*** decided by any court in the history of this state that holds that property taken by eminent domain to be in the ownership and control of the public ***and*** available to the use of the general public constitutes anything other than a public use. Those that are found, though, support the conclusion that a public road is a public use.

The case that provides the clearest discussion of streets and roads as a public use for which eminent domain can be exercised is Rogren v. Corwin,[70] which involved a public road laid out over the property of Defendant Corwin; the only apparent beneficiary of the road was Rogren. The county highway commissioner found, after a hearing, that the proposed road was a "public necessity," and authorized the payment of "damages" to Corwin. The decision was ultimately reviewed by a jury under the- applicable law governing determinations as to such public roads. The jury found public necessity, and Corwin appealed. This Court held the taking to be appropriate, even though the road would serve only one parcel, because the road would be a public road. The Court quoted extensively, and with approval, from one out-of-state opinion, Varner v. Martin:[71]

> [T]he only real inquiry in this or any other case ... is whether the use for which the private property is authorized to be condemned is a public use or a private use. * * * This, it will be found, depends largely upon whether the property is under the direct control and use of the government or public officers of the government, or, what is almost the same thing, in the direct use and occupation of the public at large, though under the control of private persons or of a corporation; these together constituting one class. * * *[72]

[69] Id. at 353.
[70] Rogren v Corwin, 181 Mich. 53; 147 N.W.2d. 517 (1914).
[71] Varner v. Martin, 21 W.Va. 534 (1883)
[72] This statement certainly presages this Court's opinion in Hathcock.

> All agree that, if the road has been established by public authority, and the damages for the condemnation of the land has been paid by the general public, and the road is under the control and management of public officers, whose duty it is to keep it in repair, then it is a public highway, and the legislature may constitutionally authorize the condemnation of land for the route of such a road, though it may have been opened . . . on the application of a single person to whose house the road led from some public road . . . [73].

The Court continued its quotation of the case:

> The legislature can authorize a county court to open a public highway at the expense of the county, and place it under the control of public officers, whose duty it is to keep it in order, and the fact that the legislature authorized this to be done on the application of a single person, and it was done for his special accommodation, though it might be apparent that such road would be used but a very small extent by any other person than such applicant, still such act would be constitutional, and such an opening of a public road by the county court would be in the eyes of the law an opening of a road for a public use . . . . [74]

Having concluded that the road in question was a public use, even though it served only one property, because it was publicly owned and maintained, the Court turned to the separate question of necessity, and found that the jury had sufficient evidence before it to conclude that there was a "benefit to the public of sufficient importance to warrant the public in incurring the expense in making it."

The analysis in Rogren fits cleanly in this case. The road will be public, owned and maintained by the City, even though it primarily serves only a couple of properties. And certainly the properties served here are properties that the public at large has more of an interest in getting to—large, industrial users with employees, vendors, and the like. Rogren in this way is also distinguishable from one of the cases cited by the Court of Appeals, Tolksdorf v. Griffith,[75] which

[73] Rogren, supra, at 520.
[74] Id. at 521.
[75] Tolksdorf v. Griffith, 464 Mich. 1; 626 N.W.2d. 163 (2001)

involved a taking of private property for a ***private*** road. In Tolksdorf this Court found that, even though the establishment of a private road for the benefit of one private owner over the land of another was authorized by statute, under the Private Roads Act,[76] it would not result in the right of the public to actually use the land taken, and thus could not fall within the concept of a public use, regardless of the existence of some minimal public benefit to the project. Here, the road would have been public in all respects, and would solve a "public" problem—the dangerous curb cut onto Grand River.

There have been only a few other cases that address the use of eminent domain for the establishment of roadways. In Detroit International Bridge Co. v. American Seed Co.,[77] this Court held that a toll bridge established by public authority is a highway, and that land may be taken for that use under power of eminent domain. The condemning authority was a for-profit corporation formed for the purposes of constructing, owning, and/or operating a highway bridge across the Detroit River to Canada. The bridge was for vehicular and pedestrian traffic, and was a toll bridge. The corporation involved was constituted under a statute that provided the right of eminent domain to any corporation "organized for the purpose of constructing, owning, or operating any highway, bridge, or tunnel across or under any river, stream, or other waterway," etc.[78]

The property owner challenged the statute as unconstitutional on the grounds that the use of eminent domain was not restricted to a "true" public purpose. Consistent with the strict "actual use" school of thought described above, this Court disagreed, finding that the bridge, and the related property necessary for its construction and use, constituted a highway, which was ***by definition*** public:

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[76] MCL 229.1 *et seq.*; MSA 9.281 *et seq.*
[77] Detroit International Bridge Co. v. American Seed Co., 249 Mich. 289; 228 N.W. 791 (1930).
[78] Id. at 294.

> When employed in a statute, there is no doubt of the meaning of the word 'highway,' unless, as sometimes happens, the context plainly shows a perversion of use. The expression 'private highway' is a misnomer, and 'public highway' is tautology. A highway is a public way for the use of the public in general, for passage and traffic, without distinction. [citations omitted.][79]

The Court further explained that the statute did not amount to authorizing a taking for private use, or even for both a public and private use, because the taking of the property "plainly has reference back to the public purpose of constructing, owning, or operating any highway bridge." The Court further explained that the plaintiff, in exercising the power of eminent domain, "irrevocably bound itself to the statutory public use of the property."[80]

In this case, the ***City itself*** will maintain ownership and control of the public road. The Court of Appeals attempts to distinguish American Seed on the grounds that it involved a statute that, by its own terms, contained a finding that constructing, owning, or operating a highway bridge was for a public purpose. As explained above in Section 1, the Court simply misread the HCRA; it does, by its terms and like the statute at issue in American Seed, specifically provide that "streets" are a public purpose "herein specifically mentioned." The other statutes cited in Section 1 also make that clear.

The Court of Appeals similarly dismissed another decision of this Court, Fields v. Highway Commission.[81] In Fields, the Commissioner of Highways sought to "lay out and establish" a highway to access certain property owned by petitioners. The property owner across whose property the road would run objected, asserting that the expense of the process and of constructing a road was to be paid by the petitioners, that the road was designed to be narrow (presumably discouraging

[79] Id. at 295.
[80] Id. at 296.
[81] Fields v. Highway Commissioner, 102 Mich. 449, 60 N.W. 1048 (1894).

public travel) and that the petitioners had already been forbidden by the property owner to cross his land to reach theirs.

The trial court, after reviewing the complaint, answer, and apparently proofs in open court, found that laying out and establishing the highway was legal. This Court, in affirming that decision, raised no issue as to the appropriateness—i.e., the ***public*** use at issue—of that action, stating: "There is no statute or rule of law that expressly determines that, before a public highway can be laid out, it must have certain and definite termini in other public highways."[82] The Court of Appeals dismisses Fields as a "procedural decision,"[83] but even given the procedural emphasis of that case, the Court cannot avoid the assumption, consistent with Rogren, that the road was a public use because of its public ownership, so long as it also passed the "necessity" inquiry, which the Fields Court clearly believed to be deferential.

This Court has decided other cases that similarly involve an implicit finding, or at least an assumption of, a public road as a public use. See, e.g., Rogers v. Allen[84] (concluding that the state has the right to condemn land for public road purposes); Johnson v. Fred L. Kircher Co.[85] (courts do not have the power to determine what streets shall be opened and worked by a municipality); In Re Opening of Gallagher Ave.[86] (authorizing condemnation of land for highway under statute granting general eminent domain authority, rather than highway act); and In Re Widening of Woodward Ave.[87](new trial granted for compensation).

The Adells' argument, by contrast, is constructed with several cases that do not specifically relate to roads, and that are ultimately irrelevant because they specifically contemplate the exercise

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[82] Id. at 452.
[83] City of Novi v. Adell, 253 Mich. App. at 351.
[84] Rogers v. Allen, 246 Mich. 501; 224 N.W. 632 (1929).
[85] Johnson v. Fred L. Kircher Co., 327 Mich. 377; 42 N.W.2d. 117 (1950).
[86] In Re Opening of Gallagher Ave, 300 Mich. 309; 1 N.W.2d. 553 (1942).
[87] In Re Widening of Woodward Ave, 297 Mich. 235; 297 N.W.2d. 468 (1941).

of condemnation authority for clearly private uses, if not actually private ownership. City of Centerline v. Chmelko[88] involved the use of eminent domain to acquire property that was at all times during the proceedings intended to be transferred in fee to a car dealership. Lansing v. Edward Rose Realty, Inc.[89] involved the condemnation of an easement specifically for cable company access and permanent occupation of private property for privately owned and controlled equipment. And Shizas v. City of Detroit,[90] on which the Adells particularly rely, invalidated a statute that authorized condemnation of property for both public and private use—specifically, a parking structure a portion of which could be leased to private parties for private non-parking related uses. These cases, frankly, are completely distinguishable from the public road question before the Court.

This Court said in Portage Twp Board of Health v. Van Hoesen,[91] that "[t]he public use implies a possession, occupation, and enjoyment of the land by the public at large, or by public agencies...." Similarly, in Lakehead Pipe Line Co. v. Dehn, [92]this Court found that a privately-held pipeline for the transportation oil throughout the state was "a public use benefiting the people of the State of Michigan," in large part because of the fact that the state would retain sufficient regulatory control to make sure the facility would continue to be devoted to that transmission use. The public road at issue here did not somehow become a "private use," despite its public possession and occupation, merely because it particularly benefited the two industrial properties.

[88] City of Centerline v. Chmelko, 164 Mich. App. 251; 416 N.W.2d. 401 (1987).
[89] Lansing v. Edward Rose Realty, Inc., 192 Mich. App. 551; 481 N.W.2d. 795 (1992); aff'd., 442 Mich. 626; 502 N.W.2d. 638 (1993).
[90] Shizas v. City of Detroit, 333 Mich. 44; 52 N.W.2d. 589 (1952).
[91] Portage Twp Board of Health v. Van Hoesen, 87 Mich. 533; 49 N.W.2d. 894 (1891).
[92] Lakehead Pipe Line Co. v. Dehn, 340 Mich. 25, 36; 64 N.W.2d. 903 (1954).

3. The Fact That Benefits Will Accrue To A Private Property Owner As A Result Of a Public Road Improvement Does Not Transform That Public Use Into A Private Use, Even If The Benefits To The Private Owner Are Substantial

"Perhaps no better example of a public use could be given than that of the ordinary highway, where the easement or right-of-way vests in the public for the common and equal use of all." 1 Lewis, A Treatise on Eminent Domain in the United States.[93] Lewis continues:

> ***Private property taken for a highway is taken for public use, though the way terminates on ground used for a church and cemetery and be laid out wholly to afford access to such ground, or though it accommodates but a single family, or though it be a mere cul de sac,*** or though it be laid out in one town solely for the benefit of lands and persons belonging in another town or another State, ***or though its purpose be to afford access to a farm, lumber yard, or mine.***
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> * * *
>
> In the absence of special statutory or constitutional provisions it is for the proper public authorities to determine whether a particular highway is necessary and property, and with this question the courts have nothing to do. ***A highway is a public use***, but the need of it is a question of expediency. (Emphasis added.)

2A Nichols, Eminent Domain, an oft-cited treatise in this and other jurisdictions, has an expansive discussion of the issue of public use generally, including the broad versus narrow definitions of the term. With respect to public roads, however, its conclusion admits of no issue at all:

> A public highway is unquestionably for a public use and ***may be established by eminent domain even if one person uses it***, so long as that person uses it as a member of the public (Emphasis supplied, citations omitted).[94]

Later in the treatise, the issue of incidental benefit to adjoining property is addressed:

> Highways almost always benefit the owners of land in the way through which they are laid out and, along with other public works, are often

[93] 1 Lewis, A Treatise on Eminent Domain in the United States (3d ed), §259, pp 512-513 (1909).
[94] 2A Nichols, Eminent Domain, (ed ed rev), §703(4), p. 7-44 (1999).

> constructed at the request of individuals. ***No highway or other public work project undertaken through eminent domain has been rendered invalid because it would benefit adjoining property.***[95] (Emphasis added.)

Nichols specifically addresses takings for public roads:

> The taking of private property for a public highway has long been considered a valid public use. Long before the American Revolution, this was the only use authorized by eminent domain. Because highways as well as other public thoroughfares are essential to commerce, it has never been doubted that land might be taken for the purpose of laying out, extending, or widening a public highway. Widening of a highway has been held to include the creation of a service road for a limited access highway, creation of a cloverleaf interchange, and appointment to a limited-access highway. Similarly, adaptation of a highway to facilitate transportation of boats or trailers to public waterways has been approved.
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> * * *
>
> The public character of the road does not depend upon the degree of public necessity or convenience that requires the road or the extent to which the public uses it, or the number of persons that it accommodates. ***It is not a valid objection that the proposed highway will be a cul de sac or that it will lead to the private residence or place of only one individual.*** The public may desire to visit or do business with that person and needs a way to reach her. If a road is to be open for public travel, the purpose for which the public may wish to travel is immaterial. (Citations are omitted. emphasis added.)[96]

Professor Epstein makes the argument that even *private* highways (e.g., toll roads) can constitute a public use:

> Highways and parks are also illustrative of cases where the marginal cost of servicing additional individuals is in practice always positive. Private toll roads and parks are easily organized, so public parks and toll roads could be made private if the government chose to abandon them. The property in these cases is public only because the government chooses to provide the service. ***Yet the eminent domain power can surely be used to acquire land or other property for these purposes.***

[95] 2A Nichols, Eminent Domain, §703(5)(b), p. 7-48.
[96] 2A Nichols, Eminent Domain §7.06(4)(a), pp. 119-124.

> The key point is that a second sense of public use is operative here. The highways and parks are operated under the conditions appropriate to common carriers: The service is open to all who meet the minimum requirements of fitness to be served, and some non-discriminatory fee may be charged for the use. ***So long as all individuals have the right to use the facility on these terms, than the public use requirement is satisfied, even if all individuals cannot simultaneously use it.***[97] (Emphasis added.)

Courts in countless other jurisdictions have appropriately recognized the public nature of a public road improvement despite the fact that "specific and identifiable" interests may also benefit—recognizing that an "incidental" benefit may be significant without negating the general benefit to the public as a whole. For example, in Town of Perry v. Thomas,[98] the court held, "It is well settled that the taking of land for public streets, highways, and roads is a public use." Similarly, in Sturgill v. Commonwealth of Kentucky,[99] the court applied a version of the "actual use" rule discussed above, stating "[t]he accepted test is whether the roadway is under the control of public authorities and is open to public use, without regard to private interest or advantage." The court concluded its opinion with the following statement:

> "Our conclusion is based upon long recognized legal precepts which allow the government broad latitude in the development of public highways. Their utility is not for the courts to determine. ***That one member of the public specially benefits thereby does not impugn their public character if they are built for and open to public use.*** We find nothing illegal or unconstitutional in this taking and the circuit court properly denied injunctive relief." (Emphasis Supplied.)

See also, Department of Public Works v. Koch,[100] ("[i]t is the right in the public to use, not its exercise of the right, that constitutes a road a public highway"); Evans v. State of New York,[101] ("that the road may be of primary benefit to those property owners whose property abuts it does not

[97] Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain, pp 167-168. (1985).
[98] Town of Perry v. Thomas 22 P.2d. 343, 346 (Utah, 1933)
[99] Sturgill v. Commonwealth of Kentucky, 384 S.W.2d. 89, 91 (KY, 1964).
[100] Department of Public Works v. Koch, 210 N.E.2d. 236, 238 (ILL. 1965).
[101] Evans v. State of New York, 34 A.D.2d. 1007, 1008 (N.Y. 1970).

serve to convert a public use to a private one"). The Maryland Court of Appeals' analysis in Green v. High Ridge Association, Inc.,[102] seems directly on point here:

> ". . . while actual use of the condemned property by the general public is not necessary, nonetheless, when the general public is entitled to physically use the condemned property, the use is public for the purposes of the constitutional provision . . . consequently, the condemnation of private property for a public highway, street, or road, constitutes a public use within the meaning of the Maryland constitution. Since members of the general public are entitled to use a public highway, street, or road, this Court has, ***without exception***, held that condemnation for such a purpose is constitutionally authorized."

As the New York Supreme Court stated in In Re Knolls Crescent,[103] with great brevity, in a case very similar to this one (involving a "deadend" road at a developing parcel):

> Bluntly stated, the question is: Can the taking of the land for the opening of a public street be for other than a public use? Ordinarily, the statement of such a question would indicate its own negative answer.

And as this Court stated in Rogren, in a quotation of other authority with clear approval:

> It redounds in some degree, to the interest of the public, that all the citizens who compose it should be so accommodated, and there is no principle, upon which the wants and necessities of one individual must be imperatively rejected, which would not be applicable to two, three, or a dozen, or any given number short of the whole or the greater part of the community.[104]

The Court of Appeals does not say in its opinion how many properties must be served by a public road before it will be considered truly public—if not two, then ten; if not ten, then twenty? The foregoing cases stand for the proposition that it can be one, so long as the road is publicly owned and controlled. Contrary to the Court of Appeals' decision, neither Hathcock, nor Poletown, nor its famous dissent admit of the opposite conclusion.

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[102] Green v. High Ridge Association, Inc., 695 A.2d. 125 (MD. 1997).
[103] In Re Knolls Crescent, 117 N.Y.S.2d. 835.
[104] Rogren, supra, at 521.

4. ***Hathcock's* Three-Part "Instrumentality of Commerce" Test For Determining Whether A Particular Taking Is For a Public Use, Where The Property Will Be Transferred To A Third Party, Cannot Be Applied To A Taking For A Traditional Public Use Like A Road**

The whole point of new Hathcock test—and of the Poletown formulation that it replaced—was to create a mechanism by which to address the claim that the use of the property to be taken and then turned over to a private party was still essentially public, even though a private entity would end up owning the property. A public road is the very sort of public use that the Hathcock test seeks to approximate. Hathcock's inquiry, informed by Justice Ryan's dissenting discussion in Poletown, can only logically be applied to those non-traditional situations in which the public benefit is not obvious (i.e., transfer of the property to a private owner); it makes no sense to apply it in the case of public roads, public sewers, public drainage ditches, and the like. Every one of those uses, in virtually every case in the real world, benefits specific and identifiable private interests who not only use those improvements, but often volunteer or are required to pay for them.

The Court of Appeals below ended up applying what became the Hathcock test when it went through Justice Ryan's analysis in his Poletown dissent. In applying the test, it did make a passing reference in a footnote (fn. 68) that the comments of Justice Ryan "were within the context of a case in which the public entity was condemning private property for the use and ownership of a private corporation."[105] The Court did not find that fact to be significant—and yet it is ***the most significant fact about both Poletown and Hathcock***. This Court's discussion in Hathcock clarifies that the test it announced in that case, consistent with the Justice Ryan dissent, is limited to cases where the property is transferred to a private third party.

The Hathcock Court, in its introduction to the "instrumentality of commerce" discussion, made it clear that it was only addressing public use in the context of private transfers:

[105] Adell, supra, at 351.

> This case does not require that this court cobble together a single, comprehensive definition of "public use" from our pre-1963 precedent and other relevant sources. The question presented here is a fairly discrete one: are the condemnation of defendants' properties and the subsequent transfer of those properties to private entities pursuant to the Pinnacle Project consistent with the common understanding of "public use" at [the time of] ratification [of the 1963 constitution?

Nothing thereafter in the Hathcock opinion supports the application of the "instrumentality of commerce" analysis to this kind of traditional public use. This fact is best illustrated by reference to the Court of Appeals opinion itself, which fairly ties itself in knots trying to fit this case into that three-part analysis.

A. Public Necessity of the "Extreme Sort"

The first element of the "instrumentality of commerce" inquiry is "indispensability of the extreme sort otherwise impracticable."[106] By this the Hathcock Court confirmed that it meant situations in which "collective action" was necessary—i.e., in situations where assemblage of land was necessary, as in the case of a railway or canal. Or "highways," as to which without eminent domain, these essential improvements requiring particular configuration—narrow and generally straight ribbons of land—would be "otherwise impracticable; they would not exist at all."[107]

The Court of Appeals found this concept to be "perfectly applicable" to the so-called ring road, but, offering no factual or other basis for distinction, saw "almost no applicability" to the spur road: "[it] is, in our view of the record, not an essential improvement that requires a particular configuration."[108] In that thought lays the fundamental flaw of the Court of Appeals' analysis of this case, despite its foretelling of this Court's eventual direction in Hathcock: whether the industrial spur roadway—as an already-recognizable, traditional, public use—is "an essential improvement

[106] Hathcock, supra, at 473.
[107] Poletown, supra, at 675 (Ryan, J., dissenting).
[108] Adell, supra, at 352.

that requires a particular configuration" is a question of ***public necessity*** as to which courts defer to the agency's decision unless presented with evidence of fraud, error of law, or abuse of discretion.[109]

The point of the Hathcock test is to ensure that a non-traditional use for which a taking is being proposed can be equated with a taking for purposes of building a road or some other improvement that only the government can achieve in the face of "unreasonable landowners." The Court of Appeals would apply the test to literally every acquisition of property by a municipality that might benefit a private party—every road, every sewer, every water line, every drainage ditch. Yet in virtually every one of those cases, the improvement confers a clear and substantial benefit upon the properties that will use it.

In this case, both the trial court and the Court of Appeals essentially said that the public does not have a predominant interest in the manner in which vehicular and pedestrian traffic accessed the two privately owned properties at issue here. The lower courts found this to be the case even though "the public" (i.e., employees, suppliers, vendors, sales professionals, etc.) will travel to those properties over other public roads everyday. These are substantial, acreage parcels, with large building improvements on them. Between Wisne/PICO and General Filters, there are ***hundreds*** of employees, vendors, and salespeople moving in and out of that site on a daily basis. Even if only a few vehicles utilized the new road improvement, it would help lessen an unsafe traffic condition on Grand River, a public road used by thousands of vehicles a day. That is not a guess; the Adells stipulated to it as fact.

The factual merits of the lower courts' decision are discussed below. But there is no discernable basis in either court's opinion to distinguish the circumstances at issue in this case from those that occur throughout this state on a daily basis in the establishment and widening of roads, the elimination of curb cuts, and the rerouting of traffic. In vast numbers of those cases, specific

[109] Hathcock, supra, at 465.

benefits are necessarily conferred upon property owners affected by those road improvements. The establishment of a public road is the typical kind of exercise of eminent domain rights that courts have easily dealt with over literally two centuries of American jurisprudence. To say that such an action must now pass the Hathcock test for transfers to third parties—like an office park or a casino or a sports stadium—in the normal course of things deprives that test of all meaning.

B Accountability to the Public

The Court of Appeals does, albeit grudgingly, score this one in the City's favor, acknowledging that the industrial spur is to be publicly owned and controlled. This most important fact seems oddly irrelevant to the lower court, though.

C. Facts of Independent Public Significance

The Court of Appeals makes a statement toward the end of its opinion that reveals its complete lack of appreciation for not just the facts established at the trial court hearing but for the function and purpose of the local legislative process:

> The third factor that Justice Ryan mentioned was selection of land according to facts of independent public significance. He amplified on this point, stating that 'determination of the specific land to be condemned is made without reference to the private interests of the corporation. The determination is based instead upon criteria related to the public interest.' In our view, it is on this characteristic that A.E. Wisne Drive fails entirely. ***The record convinces us that that decision to condemn the Adell Trusts' property was made almost entirely with reference to the private interest of Wisne/Pico. We conclude, therefore, that A.E. Wisne Drive does not fall into the instrumentality of commerce exception that Justice Ryan described in this Poletown dissent.*** (Emphasis added.)[110]

The "Ring Road Feasibility Study and Land Use Analysis," introduced as evidence during the trial, was prepared by Vilican-Leman & Associates, an ***independent consultant*** hired for the sole purpose of conducting the feasibility study, not the City of Novi's regular planner. The date of the

[110] Adell, supra, at 353.

report is January 1984—***before Wisne even owned the property at issue***. Beginning on Page 30 of the document, the ***independent*** consultant addressed the "northwest quadrant" where what is now the Wisne property is located. The discussion shows that the ***independent*** consultant at one point considered bringing the ring road itself between the General Filters and Wisne buildings, but abandoned that for various reasons. The study went on to state:

> The study continued in this quadrant, however, because another means of letting employee traffic out of the three industrial uses near the east end of the viaduct needed to be found [**this is the General Filter/Wisne property**]. Traffic exiting these three uses must now exit onto Grand River Avenue at the foot of the viaduct. This has created a hazardous traffic problem resulting in frequent accidents.
>
> * * *
>
> This proposed configuration would permit the construction of a ***new street*** [this is the industrial spur] to serve the industrial uses to the west. Employee traffic could then exit via the new street and ring road. Though it would require extending the new street through an area of poor soils, the cost of constructing this road, compared to the ring road through the same area, would be substantially less.[111]

The map or drawing showing the proposed industrial spur is found between pages 32 and 33 of the report. The report makes no reference to the ownership of the property, and focuses exclusively on the traffic safety issues. If the study here doesn't count as a fact of "independent public significance," nothing ever will.

Another related factual misunderstanding of the Court of Appeals is found earlier in the opinion:

> There is also evidence, to which Defendants stipulated, that the current exit from the Wisne/Pico property onto Grand River Avenue created a hazardous situation for the Grand River traffic. However, the Oakland County Road Commission planned to eliminate this access road as part of the Grand River Bridge Improvement Project. The evidence indicated that the County had not planned an alternative access because it was relying on the City's taking of the Adell Trust's

[111] Appendix, pp 62a-63a.

> property to create A.E. Wisne Drive. The Wisne/Pico property would not be landlocked after the County bridge project eliminated the current access road to Grand River Avenue because Wisne/Pico had an easement to its property over the Novi Expo Center property. While the ring road was important to eliminate traffic congestion, it could be built without taking the Adell Trust property to create A.E. Wisne Drive. A.E. Wisne Drive, as the name indicates, would primarily benefit the Wisne/Pico property. Neither the City nor the County had seriously considered alternative access routes to the Wisne/Pico property other than taking the Adell Trust property for A.E. Wisne Drive.

The Court of Appeals was apparently under a very fundamental misconception about the alternatives available to the City and the County. If the new industrial spur drive were not built in the area proposed in the 1984 study, it would be inconceivable for the County to close the Grand River Road access. There is no way the County (or, later, the City) could simply just remove a public curb cut without an adequate replacement—the costs could be staggering. The lower court's and the Adells seem to rely on some alternative access to the sites through an easement over the Expo parking lot, with a curb cut on Grand River. The "easement" referred to by the Court of Appeals was never put into evidence; the court makes no note of ***where*** the alternative easement access is located, or whether it has an expiration date or other limitations. Most importantly, though, it is not a public road; no public agency or entity could afford the potential cost of replacing a public road access fronting a major road with an easement into someone else's parking lot .

D. The Law Assumes that A Governmental Decision to Own an Improvement Is Predominantly in the Public Interest

The very first sentence of this Court's opinion in Hathcock acknowledges that eminent domain cases involve the clash of ***two*** "bedrock principles of our legal tradition: the sacrosanct right of individuals to dominion over their private property . . . and the state's authority to condemn private property for the commonweal."[112] The entire Hathcock opinion operates from the basic

[112] Hathcock, at 450.

premise that, under our constitutional form of government, there are some things on which we all agree, and those are, to the best extent possible, set forth in that our governing documents, including our state constitution. Courts are sometimes called upon to determine what those things are, and in doing so they look to common understandings of the words and terms used in the document, although in some case legal terms of art might need closer analysis.[113]

Part of our constitutional heritage—and thus part of the analysis of this case—is the idea that courts do not lightly intrude into the decision process of legislative bodies, whether state or local. Jefferson described the legislative process as government "closest to the people." Political theorists through the ages have argued that local democratic rule is essential to promoting public confidence in the rule of law and in governmental authority generally. Local government is direct and participatory; it reminds individuals that they are a part of a greater whole, and therefore must assist in its upkeep. In less lofty terms, most people figure out soon enough that it is their local elected officials who are ultimately responsible for making sure that the toilets flush, that the roads are maintained, and that police and fire personnel show up when needed. The right to petition your government for the "redress of grievances" works best as to that governing body that regularly assembles just down the road.

Michigan's 1963 Constitution addresses the concept of local authority in clear terms. Const. 1963, art. 7, §22, states:

> Each such city and village shall have power to adopt resolutions and ordinances relating to its ***municipal concerns, property and government***, subject to the constitution and law. No enumeration of powers granted to cities and villages in this constitution shall limit or restrict the general grant of authority conferred by this section. (Emphasis added.)

The language of another constitutional provision, Const. 1963, art. 7, §34, drives the point home:

[113] Id. at 466-471.

> The provisions of this constitution and law concerning counties, townships, cities and villages shall be ***liberally construed in their favor***. (Emphasis added.)

This Court certainly made it clear in Hathcock that the question whether a particular use for which property is being condemned is a public use is a ***question of law for the courts***, and deference to legislative bodies on that score is not required.[114] But once that hurdle is cleared, once the proposed improvement is identified as one that is historically accepted as falling within the known realm of public uses, the court's role changes, as does the nature of its inquiry. Courts cannot, and should not, substitute their judgment for that of the local bodies charged with deciding when, where, and whether to make such traditional publicly owned and controlled improvements.

This is no small point, at least from the local government perspective. The Court of Appeals' rationale, if not addressed or clarified by this Court, will have serious practical ramifications for the provision of governmental services and the protection of the health, safety, and welfare that is generally accomplished by the provision of public infrastructure improvements "for the benefit of us all." What is the effect, for example, of the Court of Appeal's opinion on the ability of a municipality to special assess property owners for public improvements?

A special assessment may only be imposed when the funded improvement confers a special benefit upon the property assessed beyond any general benefit to the public, e.g., Kuick v. Grand Rapids.[115] In fact, a special assessment is permissible only if the improvement will actually result in an increase in value to the land specially assessed. Dixon Road Group v. Novi.[116] If, as the lower courts apparently concluded, ***improved road access*** to private property is a "predominantly" private benefit, it is difficult to see how any street improvements could be financed by special assessment if they require the use of eminent domain. The very use of special assessment financing conclusively

[114] Hathcock at 467.
[115] Kuick v. Grand Rapids, 200 Mich. 582, 588; 166 N.W. 979 (1918).

establishes the existence of a special benefit to specific parcels of land. The analysis in the Court of Appeals' opinion calls for increased judicial involvement in basic, day-to-day public infrastructure planning, and is ***not*** what this Court contemplated in Hathcock.

This is also true of the extension of public water, sanitary sewer, and storm drain lines. With the exception of things such as major sewer interceptors or regional drains, these types of improvements are inherently driven by—are in fact actually ***caused*** by—the development of particular identifiable properties. In many cases, the properties affected by these extensions ***could be*** developed without such public improvements—i.e., with septic systems, wells, and retention ponds. Under the analysis of the trial court and the Court of Appeals, ***courts*** will now decide—on what basis isn't clear—whether the "public" really has a sufficient interest in connecting a particular property to the public sewer as opposed to allowing connection to a private septic system. These are not the kinds of decisions the courts of this state are used to making in terms of public use as "commonly understood,"

Imagine a property proposed for development of, say, a manufacturing plant. There is room for an underground septic system on site, but public sanitary sewer is available one parcel away, across another property that already has sanitary sewer service satisfactory to its owner—a not uncommon situation. Condemnation serves only one specific and identifiable property. But the decision whether to make the connection involves consideration of all manner of issues—state and federal clean water requirements if the parcel is near a watercourse; pressure district analyses as to whether and how to "fill" existing sewer pipes; and public policy issues that might favor connection to avoid possible contamination.

Does the City now, under the rationale of the trial court and Court of Appeals, have to convince a trial court after a hearing that it is in the "predominant" interest of the City to have the

[116] Dixon Road Group v. Novi, 426 Mich. 390; 395 N.W.2d. 211 (1986)

connection made, or that there is necessity of the "extreme sort," or that it was the City's "independent" idea, not some developer's? Otherwise the public sewer is not a public use? Will trial courts, and not the local elected officials most accountable to the public, now weigh the benefits of each and every municipal public infrastructure project? Is this Court now to sit as a "super health board"? Just as this Court has said countless times that it will not sit as a "super zoning board," Brae Burn v. Bloomfield Hills,[117] it should decline that role in this context, or otherwise risk a significant increase in the dockets of the courts in this state.

5. The Adells Did Not Establish The Lack Of "Public Necessity" In This Case

The Court of Appeals in this case assigned the burden of proving that the proposed taking was for a public use to the City. There is no legal basis for that conclusion. As a question of law, under Hathcock, the concept of assigning "burden" may be somewhat of a misnomer. There is no reason why the City should not be accorded the presumption of constitutionality that normally attends governmental decisions. See, e.g., Brae Burn, supra. Regardless of who had the "burden" in the public use portion of the case, it is clear that the Adells, on the public necessity issue have the burden of establishing the City's determination to secure alternate access for the two affected properties was not grounded in fact and was a reasonable exercise of governmental authority.

A. The "Public Necessity" Standard of Review—Fraud, Error of Law, or Abuse of Discretion

The Adells limited their "public necessity" challenge to the question whether the City had a sufficient present intention and wherewithal to build the improvement at issue, since while the case was pending below the State of Michigan withdrew its previously-approved funding for the project, both the ring road and the spur road.[118] The trial court did not rule in the Adells' favor on this issue.

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[117] Brae Burn, Inc. v. Bloomfield Hills, 350 Mich. 425, 432; 86 N.W.2d. 166 (1957).
[118] Appendix, pp 220a-221a.

Since they did not file a cross appeal on the question, this issue of "necessity" should be considered waived by the Adells. Gross v. General Motor Corp.[119]

If the Court determines that the Adells have sufficiently raised the public necessity question by virtue of their Poletown arguments below, or to the extent the Court believes it appropriate to address the issues raised by the Court of Appeals' decision in connection with the public use and benefits of the proposed spur road, some discussion of the concept of public necessity is in order. As noted above, Hathcock confirms that the issue is a factual one, and that the role of reviewing courts is limited and deferential.

Under the UCPA, the City's determination of public necessity as to the spur road is binding on the courts in the absence of a showing of "fraud, error of law, or abuse of discretion."[120] In general, this limited review standard means that the City's determination to undertake the project—i.e., the necessity of the project as a whole—is not reviewed by the courts. State Highway Comm. v. Vanderkloot.[121] Vanderkloot explains that the 1963 constitution only talks about the need for paying "just compensation" for the property taken; the applicable statues then add the limited necessity inquiry by providing that a property owner has a right to judicial review to determine the necessity for the taking "for the purposes stated in the petition."[122] This question, according to Vanderkloot, includes considering whether the project needs some or all of the property involved. This inquiry, in turn, includes the "variables" of whether the land in question "is reasonably suitable and necessary for" the contemplated project and whether the City needs to take this particular property rather than some other property.[123] See also, Nelson Drainage District v. Fillipis[124] and Troy v. Barnard.[125]

[119] Gross v. General Motor Corp, 448 Mich. 147, 162; 528 N.W.2d. 707 (1995).
[120] MCL 213.56; MSA 8.265(6)
[121] State Highway Comm. v. Vanderkloot, 392 Mich. 159, 175-176; 220 N.W.2d. 416 (1974)
[122] MCL 213.56; MSA 8.265(6)
[123] Vanderkloot, supra, at 175-177.
[124] Nelson Drainage District v. Fillipis, 174 Mich. App. 400, 404; 436 N.W.2d. 682 (1989).

The facts of this case as elicited below raise no question of either "fraud"—i.e., misrepresentation to the Adells of the purpose for which the property is taken, or the use to which it will be put—or of "error of law," since the statutory authority for the road project is clear. In reviewing the City's decision for abuse of discretion, the Court considers whether the decision was violative of fact and logic.[126] And in addressing that issue, any reviewing court must be mindful of Justice Williams' admonition in Vanderkloot that:

> ...any attempt to overdefine "necessity" in connection with "abuse of discretion" creates the potential hazard of destroying the essential flexibility which enables both administrative bodies and the judicial system to take into consideration whatever factors are relevant to particular determinations of highway condemnation necessity.[127]

As will be shown below, the issue that both lower courts, but particularly the Court of Appeals, failed to appreciate was the benefit to the City as a whole and its residents of the removal of the curb cut or access onto Grand River—an access too close to the bridge over the railroad, too close to the new proposed ring road where it entered Grand River, and too sharp to be safely navigated by traffic. The Court of Appeals didn't think so, but, under this Court's decision in Vanderkloot, that opinion was not its to give.

B. There Was No Fraud, Error of Law , or Abuse of Discretion in This Case

Initially, the Court can expect the Adells to file a brief that contains a complicated recitation of facts that they claim amount to a determination to create a public road for some ulterior purpose relating apparently to securing funds from either Wisne/PICO or the State of Michigan, in some improper way. These facts took up the bulk of the hearing before the trial court. ***Yet, a close reading of the lower court opinions will show that neither court either accepted or based its decision on the version of events or the theories of fraud/abuse posited by the Adells***. Both courts

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[125] Troy v. Barnard, 183 Mich. App. 565; 455 N.W.2d. 378 (1990).
[126] Nelson Drainage District, supra, at 404.

recited the facts in fairly neutral terms, then cited the "heightened" nature of the inquiry in Poletown and the fact that the road served as access for essentially two properties, and then—without any discussion of the merits of the road project—concluded that the public road would really be a private road. By virtue of the Poletown analysis, both courts ended up failing to understand the reason for the taking and simply substituted their judgment for the City's.

The Adells' assertion below that the spur road was done "for" Wisne is belied by the record. The ring road study established both the main road and the proposed industrial spur in essentially the same location as they were depicted at the time the Novi City Council passed its resolution declaring necessity and ordering a taking of the property in 1998. The Adells offered no evidence to refute the study. ***Neither court below even mentioned the study***. Yet, the study made clear the following unrefuted facts:

1. Fifteen years before, when the study was made, the City already experienced traffic congestion at Grand River Avenue and Novi Road (p. 18).

2. The lack of a secondary road system contributed to congestion, since it resulted in direct vehicular access to Grand River and Novi (p. 19).

3. The existing direct access from the industrial facilities in the northwest quadrant of the Grand River/Novi intersection was hazardous and resulted in frequent accidents. (p. 30).

4. Therefore, the route proposed by the study for the ring road through the northwest quadrant included the industrial street. The study identified the industrial street as a future right-of-way—i.e., a public street (map, p. 32)

The testimony of a traffic expert was presented as well. William Stimpson stated that the existing access was hazardous, that it was deficient with respect to well-recognized national standards. The access was dangerous to traffic on Grand River Avenue.[128] Mr. Stimpson's testimony was unrefuted, the Adells offered no objection to his expertise, and stipulated to his

[127] Vanderkloot, supra, at 178.
[128] (Tr. II, pp. 258-260)

conclusions.[129] ***Neither court below even mentioned either the ring road study or Mr. Stimpson's testimony.***

The Adells, the trial court, and the Court of Appeals also appear to have found it to be significant that a reworked curb cut on Grand River ***could have been*** designed and installed by the County in connection with its separate bridge improvement project, for the benefit of the Wisne/PICO and General Filters' properties. All three also seem to find significant the fact that there is an undefined and unspecified easement at the back of the Wisne/PICO property across the Adell property leading to Novi Road. The Adells never introduced the easement into evidence so its duration, scope, intent, and purpose are not of record, and therefore it is completely irrelevant to the traffic safety issue at hand.

The Adells' claim that the spur road was done only as a way to secure financing for the ring road through the state transportation grant also is unconvincing, since at the time of the hearing below, the grant was no longer in place, yet the City's efforts to acquire the property continued.. The Adells presented no evidence that the grant applications, the discussions with the Wisne/PICO property owner, or any other issues other than those set forth in the City's resolution with respect to the traffic safety issue, even figured into the ***City Council's*** legislative determination to exercise the power of eminent domain to create a public road, for public use, across the Adells' property.

The fact that the City sought private contributions to partially fund the road improvements does not alter their public character. Again, the 1984 ring road study indisputably established that the improvements were needed to alleviate traffic congestion and a traffic hazard. The parties stipulated that the hazard still existed at the time of the hearing. The study itself suggested private contributions, through direct construction or special assessments.

[129] (Tr. III, p. 258-261); Appendix, pp 289a-292a.

City Manager Edward Kriewall pursued private dollars, along with local funding and a state grant. He obtained a commitment from the Wisne company to contribute $200,000 toward the project.[130] Kriewall sought an additional $174,000 in a letter to Lawrence Wisne. Although the letter suggested that "in exchange" for the additional funds the street would be made public, in reality, it had always been designated as public as far back as the 1984 ring road study.[131] The additional $174,000 was not forthcoming, yet the road remained public, making it difficult to defend a claim that it was only made public to secure that additional money.[132]

Kriewall was simply doing what any responsible public official should do—seek all possible sources of funds to construct public infrastructure. The contribution by Wisne does not render the public road private.[133] The fact that the City sought such private contributions does not negate the essential public benefit in the road improvements—the reduction of traffic congestion and the elimination of a traffic hazard.

The "blueprint" for the public road improvements at issue in this case—both the ring road and the so-called industrial spur—was created in 1984 before Wisne owned the property. The blueprint was created by an independent contractor engaged by the City for the sole purpose of reviewing and proposing a resolution to an existing traffic congestion issue. At the time of the study, the hazardous nature of the existing ingress/egress at the Wisne/PICO property was apparent and has been stipulated to.

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[130] (Tr. I, pp. 58-59); Appendix, pp 239a-240a.
[131] Appendix, p 105a.
[132] (Tr. I, pp. 189-190); Appendix, pp 264a-265a.
[133] 2A Nichols on Eminent Domain, §7.03[5][e], p. 7-51: "Even though the persons who expect to benefit agree to defray the whole cost of the work, if the use is public then the taking is valid. The use for which property was taken is not invalid merely because in whole or part the expense was met by special assessments on adjoining land. Such a case is no different if the contributions are voluntary." See also, Township of Orange v 769 Assoc., 800 A.2d. 86 (N.J., 2002); Nicrosi v. City of Montgomery, 406 So.2d. 951, 952 (Ala., 1981)

Unlike in Hathcock (or its predecessor, Poletown), Chmelko, or Edward Rose, neither Wisne/PICO nor the predecessor in title sought or demanded the alternative public road access from the ring road. While Wisne/PICO had offered (as many property owners do) to defray some of the cost of constructing the alternative public road access, it did so only at the request of the City, and after being approached by the City. The City Council has adopted a resolution declaring the road to be a necessity, and to be public in nature. And, of course, the road itself would in fact be public in nature—owned, controlled and maintained by the City of Novi, and not by Wisne/PICO.

It is inconceivable, under these circumstances, that a court could find the taking to have been "a taking of private property for private use."[134] Once the Court is past that legal issue, under the Hathcock analysis, the question becomes one of deferential factual review under Vanderkloot. The need for the project is not reviewed. As even the trial court acknowledged in its opinion: "The court does not dispute the fact that the project proposed by the City of Novi furthers a benefit to the general public."[135] The City's actions withstand that factual review.

CONCLUSION AND RELIEF SOUGHT

In Hathcock, this Court clarified the nature and extent of the public use limitation for community/economic development projects that contemplate the transfer of the property being taken to third parties. The Court must now address and establish the appropriate use of eminent domain in connection with traditional public infrastructure improvement projects like the one at issue here.

The Adells chide the City for taking a "sky-is-falling" approach to this case, and in turn they affect indignation at the way the funding aspect governed the parties' respective actions in the "negotiation" efforts below. But this should not have been a close question on the issue of ***public use***. The road was public, not private. It was to be owned, controlled, and maintained by the City.

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[134] Poletown, supra, at p. 618.
[135] Trial Court Opinion, p. 9, Appendix p 302a.

The Adells stipulated below that the existing drive was unsafe, and did not deny that the spur road was a safety improvement. The Novi City Council decided that it was beneficial to have the Wisne/PICO and General Filters access on Grand River removed and replaced with a different public street entrance leading from the proposed public ring road. That decision easily survives the "normal" scrutiny of a public necessity hearing under the UCPA, looking for evidence of fraud, error of law, or abuse of discretion.

Neither Hathcock's "instrumentality of commerce" analysis nor Justice Ryan's formulation of it in his Poletown dissent—both designed to test whether property is being taken for "private use" in the situation where ownership, or least control, is being ceded to some private individual or entity—is implicated for uses we already know to be public. To apply that level of judicial scrutiny to traditional public infrastructure improvements like public roads and public sewers is as impractical as it is historically unprecedented. To the extent the Court of Appeals opinion below does just that, it will lead ever more frequently to exactly what happened in this case: a trial court, and then an appellate court, sitting as "super hearing boards" and substituting their judgments for those of the local governmental agency best suited to determine what publicly owned infrastructure needs to be placed, and where.

The Court of Appeals' decision cannot be permitted to stand for the proposition that publicly-owned infrastructure improvements might in fact not be public, and might under some still unclear circumstances need to go through the same three-part test for property transfers that a casino, a private office park, or a luxury hotel now requires. That result would grossly burden the trial courts. Courts review public necessity under the guidelines established by the legislature and this Court. Traditional infrastructure improvements do not, under even the most expansive reading of the principles set forth in Hathcock, demand scrutiny into their "public" character beyond that which

occurs at great length in the public forum conducted by the duly-elected councils, boards, and commissions of this state.

The Poletown dragon is slain. But public roads must still be built to move traffic safely. Public sewers and storm drains must still be established to keep the waters of the state clean—if not for reasons of conservation and sound environmental policy then at least to comply with state and federal laws and keep local governments from being fined into bankruptcy. The authority of public bodies to accomplish these uses, commonly understood to be public, by way of eminent domain must be restored. The City therefore respectfully requests that this Court ***reverse*** the decision of the Court of Appeals finding that the public road here was somehow a private use.

Respectfully submitted,

SECREST WARDLE

BY: _____
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Dated: December 13, 2004
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